No. 20,827

In the United States Court of Appeals for the Ninth Circuit

K. B. & J. YOUNG'S SUPER MARKETS, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition to Review and Set Aside and on Cross-Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of K. B. & J. Young's Super Markets, Inc., hereafter called petitioner, to review an order of the National Labor Relations Board (R. 52),[1] issued against peti-

[1] References to the pleadings reproduced as "Volume I, Pleadings" are designated "R." References to the stenographic transcript of the hearing reproduced pursuant to Court Rule 10 are designated "Tr." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "G.C. Ex." refers to exhibits of the General Counsel. "Res. Ex." refers to petitioner's exhibits.

tioner on March 1, 1966, following proceedings under Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*). In its answer to the petition, the Board requests enforcement of its order. The Board's Decision and Order are reported at 157 NLRB No. 17. This Court has jurisdiction of the proceedings under Section 10(e) and (f) of the Act, the unfair labor practice having occurred in Bakersfield, California, where petitioner is engaged in the retail sale of groceries. No issue of the Board's jurisdiction is presented.

COUNTERSTATEMENT OF THE CASE

I. The Board's Findings of Fact

Briefly, the Board found that petitioner violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union [2] as the exclusive bargaining representative of its employees. The Board also found that petitioner violated Section 8(a)(3) and (1) of the Act by causing Kelley's Markets to discharge all meat market employees; by discharging employees Imogene Brewton because of her refusal to cross a picket line; by discharging Jack Baldwin because of his Union affiliation; and by conditioning the employment of Norma Newton upon her withdrawal from the Union. The facts upon which these findings are based are set forth below.

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[2] Butchers Union Local 193, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO.

A. *Background*

Hob Nob Stores, Inc., a chain of retail grocery stores and a subsidiary of U.S. Food Stores, had three supermarkets in Bakersfield, California. These markets were located on Roberts Lane, Nile Street and Chester Avenue, and had been doing business under the name of Kelley's Markets for several years. The meat departments of all three stores were covered by a collective bargaining agreement between the Union and Kelley's executed on January 16, 1960, and effective until January 15, 1965,[3] (R. 29; Tr. 11-12, G.C. Exh. No. 2).

The collective bargaining agreement included, *inter alia*, a union shop clause which required that all employees shall join the Union within 30 days of their employment with Kelley as a condition for retaining their jobs (R. 30; G.C. Ex. No. 2).[4] As a result of

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[3] Employees in the described unit were "all meat department employees, excluding all professional employees, guards, managers, supervisors, office clericals, janitors and other employees not specifically included."

[4] Union Shop

> c. All Employees covered by this Agreement shall, on and after the thirtieth (30th) day following the beginning of their employment, or the effective date of this Agreement, whichever is the later, become members of the Union, and retain such membership during the period of this Agreement as a condition of employment, subject to the conditions of Section 8(a) (3) of the Labor-Management Relations Act of 1947.

Five Days Notice

> d. It is further agreed that if an employee becomes delinquent in his Union dues, the Employer will, upon writ-

the union shop clause, all Kelley employees were members of the Union. The agreement also included an "acquisition clause" whereby the employer agreed that the contract "will apply to all employees performing work under the jurisdiction of Local 193 in all meat markets or departments that are now, or may be in the future, operated by said employer in the jurisdiction of Local 193" [5] (R. 37; G.C. Ex. No. 2).

Also in the Bakersfield area, at all times material to this case, was a two-store enterprise called Jack Young's. One of Jack Young's stores was situated on Brundage Lane, in Bakersfield, and the other was in Visalia, a neighboring community. Jack Young's was owned by Jack Young and by his two sons, William and Charles John Young, who were minority stock-

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ten notice, dismiss said employee unless within five (5) days, the employee shall have paid up the delinquent dues.

[5] ARTICLE 1—JURISDICTION AND RECOGNITION

Bargaining Unit

a. In order to assure the securing of benefits intended to be derived by the Employer and the employees under these Articles of Agreement, the Employer agrees that this Agreement will apply to all employees performing work under the jurisdiction of Local 193 in all meat markets or departments that are now, or may be in the future, operated by said employer in the jurisdiction of Local 193.

The contract was a so-called area contract, in that its provisions were imposed by Local 193 upon all employers in the Los Angeles area whose employees had designated the Local as their bargaining representative.

holders in the enterprise. (R. 30; Tr. 282-283). Meat department employees in the Jack Young's stores were also represented by Local 193 of the Union, and bound by the same area contract which constituted the agreement between Kelley's and the Union (R. 37; Tr. 11-12). Thus, an acquisition clause provided for automatic Union representation of all Jack Young meat departments which may be acquired by Young after execution of the contract. A union-security clause required that all new Jack Young employees join the Union within 30 days after the commencement of their employment.

B. *Petitioner purchases Kelley's and discharges all employees*

During April 1964, Bill and Charles John Young began negotiations for the purchase of Kelley's (Tr. 239). The parties signed the agreement of purchase and sale on April 8, 1964, (G.C. Ex. No. 10).[6] At this time, the Youngs said that they wanted to hire their own employees, and as part of the sales agreement the parties reached an unwritten understanding that Kelley's would terminate the current employees at the three stores. (R. 30; Tr. 246.) Kelley's then terminated all employees on April 20, 1964, their last day of operation. (R. 32; Tr. 247.) Prior to this date neither the employees nor the Union received any notice of the sale and termination of employment.

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[6] The new owners intended to call their stores K. B. & J. Young's Supermarkets.

(R. 32; Tr. 26-27, 134, 146, 199, 203). Immediately after the sale, the stores were closed for one day during which inventory was taken.

On April 21, 1964, Harold Hodson, the Union business agent, received written notice from Kelley's stating it was discontinuing business in the area and notifying him of the termination of the collective bargaining agreement (R. 32; Tr. 26-27). Hodson also learned of the sale from Michelleti, the Union representative who serviced the Kelley's contract (Tr. 27). Michelleti told Hodson that "there was going to be some problem about the collective bargaining agreement because in the conversations he had had with the Youngs, they had informed him that they were not going to honor the Butchers collective bargaining agreement" (R. 32; Tr. 29).

Subsequent to petitioner's acquisition of the three Kelley stores William Young became general manager of both Jack Young's and petitioner's operations, and in this capacity set the labor relations policy for both enterprises. (Tr. 33, 322, 328, 47-52.) Cleo Thompson supervised the meat department at Jack Young's and at petitioner's stores. (Tr. 333-335.) The four Bakersfield area stores advertised in the local newspaper jointly under the name of Young's Supermarkets and charged identical prices. (Tr. 292.) Petitioner's employees received checks drawn on the Jack Young's account through June 1964. (G.C. Ex. Nos. 11(a)-14(c). Tr. 96-101, 162-165). Meat was transferred from

time to time between Jack Young's and petitioner's stores (Tr. 333). Petitioner's bookkeeper maintained his office at Jack Young's Visalia store (Tr. 341). Applicants for jobs at petitioner's stores were instructed to appear at Jack Young's for interviews and once hired, often worked for both corporations during the course of the same week. (R. 35; Tr. 59-65.)

C. *Petitioner refuses to hire Kelley employees unless they withdraw from the Union*

Benton Lee Hart, a Kelley employee for six years, learned of the sale of Kelley's on April 20, when Cleo Thompson, petitioner's meat department supervisor, informed Hart that he was terminated. Thompson told him that he could apply at the "head Office—Jack Young's Brundage Street store—" for employment with the new owners, but that the markets would be non-union thereafter (R. 32; Tr. 134, 136).

Kelley's meat cutter, Donald Hinds, asked William Young, on the evening of April 20, 1964, when it would be convenient to apply for a job with the new owners. Young replied that K. B. & J. "had all the meat cutters they needed." (R. 32.) Hinds later informed the other Kelley meat cutters and wrappers of his conversation with William Young, during the course of a union meeting on April 21, 1964, (R. 33; Tr. 146-147).

When Argus Turner asked supervisor Thompson about re-employment with petitioner, Thompson told him that "he had plenty of butchers" (R. 33; Tr. 200).

Forbes Barnum was a head meat cutter at Kelley's who also asked William Young about gaining employment with K. B. & J. (Tr. 203). Young instructed him to fill out on application at Jack Young's Brundage Street Store. (Tr. 204.) Barnum filled out this application on April 21, 1964. That night he received a call from William Young who asked whether Barnum knew anyone else interested in working for K. B. & J. (Tr. 205.) Young left his phone number with Barnum to give to prospective employees. (Tr. 205-206.) Barnum's wife, in his absence, received a call from Young who asked her to tell her husband that if he wanted to go to work for K. B. & J. he would have to get a withdrawal card from the Union. (Tr. 213-214.) Barnum found other employment. When Thompson called him to ask why he had not reported for work, Barnum replied that he did not feel he "should get out of the union to work." Thompson agreed that in that case he was better off working for another employer and added that if Barnum wanted to work for Young's he would have to get out of the Union (R. 33; Tr. 209-210).

Norma Newton was a Kelley's meat wrapper. She telephoned William Young pursuant to instructions conveyed to her by Forbes Barnum to ask about employment with K. B. & J. Young asked her to report for work the next day. (Tr. 221-222.) In answer to Newton's inquiry as to whether K. B. & J. was going "to be union," Young replied, "We have our own Union." (Tr. 222.) Newton requested a delay in her employment, and when she next spoke to Young again, he told her to "go by the Union and get

your withdrawal card and then come in." Newton said she could not work without a union. Young answered, "Well, then, forget it." (R. 33; Tr. 224.)

D. *Petitioner discharges Imogene Brewton and Jack Baldwin*

Imogene Brewton had worked for Jack Young's Supermarket until May 11, 1964, when William Young transferred her to petitioner's Roberts Lane Store. (Tr. 92-93.) She worked there until June 13, 1964, when supervisor Thompson told her that he wanted to transfer her back to the Jack Young's Brundage Street Store and transfer a new Brundage Street employee, Charlene Pappin, to petitioner's Roberts Lane Store, so that Pappin would not have to join the union under the union-security clause in the contract operative at Jack Young's. (Tr. 102-103.) Union representative Hohlbein had, without success, requested Young to require Pappin to meet the requirements of the union-security clause. (Tr. 382.) Since the Brundage Street Store was at this time being picketed by another labor union, Brewton, not wanting to cross the picket line, declined to transfer. Thompson told Brewton to make up her mind whose side she was on, Young's or the Union's. When Brewton stated that she definitely would not cross the picket line, Thompson discharged her. (R. 34; Tr. 103-106.)

Jack Baldwin had been employed by Jack Young's Brundage Street Store as a meat cutter since February 1964. On June 1, 1964, he was offered a transfer to one of petitioner's stores so that he would not have

to cross the picket line established at the Jack Young's. (Tr. 153-155.) Having chosen to transfer, he began to work at the petitioner's Chester Avenue store managed by Bill Sing. Sing asked Baldwin why he belonged to the Union. (Tr. 156-157.) Baldwin replied that he "felt like it." (Tr. 157.) When Baldwin returned from his vacation soon afterwards, William Young called him to tell him that he would not be needed. (Tr. 157.) Shortly before his discharge Baldwin had been promoted to the job as head meat cutter at the Chester Street Store. (Tr. 187-188.) Although Baldwin was discharged, his sole apprentice at the store was retained and another employee was transferred to Baldwin's job. (R. 35; Tr. 161-162, 191-192.)

E. ***Petitioner refuses the Union's request to bargain***

On May 19, 1964, Union Secretary-Treasurer Harold Hodson and Union president Charles Hohlbein entered the Jack Young's Brundage Lane Market in order to ask William Young to honor the unexpired contract which the Union had with the Kelley stores. Young refused to discuss the matter except to deny the request and to refuse to make payments to the health and welfare plan required by the contract. (R. 37; Tr. 31-32.)

Hodson then notified Respondent's agent, Valley Employers Association, of the Union's demand. (Tr. 35-36.) He received the following answer in a letter signed by H. Joseph Specht on behalf of the Association.

> On Tuesday, May 19, 1964, you phoned me and claimed you represented the employees of Young's Super Markets located on South Chester, Roberts Lane and Nile Street in Bakersfield.
>
> For and on behalf of our member, please be advised the Employer, K. B. & J. Young's Supermarkets, Inc. declines recognition of your Union, Butchers Local 193.
>
> These three stores were recently purchased and the prevailing Employer terminated all the employees. The present Employer has hired all new employees and your request that these employees join your union within 31 days is evidence enough of the employers good faith doubt that you represent a majority of these employees. (G.C. Ex. No. 3, Tr. 36-37.)

Later, in November 1964, Hohlbein and Hodson contacted William Young again in an attempt to enforce the union-security provisions of the contract. (Tr. 34, 46-50.) In December 1964, the Union also gave a "reopener" notice pursuant to the agreement, but petitioner rejected all such demands, and since that time has refused to bargain with the Union. (R. 38; Tr. 54, 74.)

II. The Board's Conclusions and Order

On the basis of the foregoing facts, the Board found that petitioner violated Section 8(a)(3) and (1) of the Act by causing Kelley to discharge all its employees; by discharging Imogene Brewton for refusing to cross a picket line; by discharging Jack Baldwin because of his Union affiliation and by conditioning the employment of Norma Newton on her

withdrawal from the Union. The Board also found that petitioner violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the exclusive representative of its employees whom petitioner had discriminatorily discharged.

The Board's order requires petitioner to cease and desist from the unfair labor practices found and from in any other manner impinging on employee's rights guaranteed by the Act. Affirmatively, the order requires petitioner to recognize and bargain with the Union upon request, to offer all Kelley's meat department employees reinstatement and backpay, to offer Imogene Brewton and Jack Baldwin reinstatement and backpay and to post the customary notices (R. 40-41).

ARGUMENT

I. Substantial Evidence on the Record as a Whole Supports the Board's Conclusion That Petitioner's Conduct Violated Section 8(a)(3) and (1) of the Act

A. *Substantial evidence supports the Board's conclusion that petitioner violated Section 8(a)(3) and (1) of the Act by causing Kelley to discharge all employees prior to petitioner's assumption of operations*

The Board found that petitioner caused Kelley to discharge the Kelley employees, all of whom, as petitioners knew, were required by their collective bargaining agreement with Kelley to be Union members. The Board further found that the basis of these discharges was the employees' Union affiliation and that petitioner's purpose in securing their discharge was to avoid an obligation imposed by the Act to bargain with the Union which represented all the employees.

It is well settled that discharge of employees under such circumstances is prohibited by the Act. *N.L.R.B.* v. *Tak-Trak, Inc.*, 293 F. 2d 270, 271 (C.A. 9), cert. denied, 368 U.S. 938; *N.L.R.B.* v. *Wings & Wheels, Inc.*, 324 F. 2d 495, 496 (C.A. 3); *N.L.R.B.* v. *Lively Service Co.*, 290 F. 2d 205, 206 (C.A. 10); *Editorial "El Imparcial"* v. *N.L.R.B.*, 278 F. 2d 184, 187 (C.A. 1).

Support for the Board's conclusion that the employees were discriminatorily discharged is shown not only by the insubstantiality of the reasons assigned by petitioner for the discharges, but also by petitioner's actions in refusing to hire certain employees unless they withdrew from the Union, petitioner's discharge of other employees because of their Union sympathies, and petitioner's cooperation with Jack Young's in that employer's attempts to frustrate union organization. The refusal to hire, the discharges, and the cooperation with Jack Young's as we show, *infra*, demonstrate petitioner's anti-union animus and make evident that petitioner's discharge of all the employees was part of a course of action designed to rid itself of Union members and thereby avoid its statutory obligations.

Petitioner sought to explain the discharges by alleging that the employees were inefficient. This reason as noted by the Trial Examiner was general and unconvincing. As the Trial Examiner stated (R. 36):

> * * * It was not until after his return to the witness stand after an intervening witness (his brother) that William Young was able to recall that he observed any meat market employees of

> Kelley at work and, as he admitted, any failure of efficiency on their part may have been due, at that late date, to the fact that they may have heard rumors of Respondent's acquisition of the Kelley markets, and, accordingly, were somewhat disorganized. Charles Young in his testimony that he observed meat market employees gossiping and drinking coffee apparently took no account of the fact that under Kelley's union agreement employees were allowed a coffee break. The overall description of Kelley employees as "lackadaisical" by both William and Charles impressed me as being no more than a catchall description to cover up any real observation by either of them of the day by day performance of Kelley employees, and both admitted that it was Kelley's methods of merchandising as well as employee inefficiency that in their opinion accounting for Kelley's losses.

Petitioner also testified that the discharges took place in order to permit petitioner to screen and hire its own personnel (Tr. 250, 287). Other facts, however, belie such a contention. Some dischargees who applied almost immediately for employment were told that petitioner already had all the meat cutters it needed, while two others, Barnum, a meat cutter, and Newton, a meat wrapper, as indicated, *supra*, were informed that employment would be available to them provided they withdrew from the Union. Thus, the record shows that whatever screening might have been intended by petitioner was for a purpose violative of the Act. In sum, the reasons which were offered by petitioner to explain the discharge fail to

withstand scrutiny and buttress the Board conclusion the petitioner discharged all the employees because of their Union affiliation. *N.L.R.B.* v. *Dant & Russell*, 207 F. 2d 165, 167 (C.A. 9); *N.L.R.B.* v. *Griggs Equipment, Inc.*, 307 F. 2d 275, 278 (C.A. 5); *N.L.R.B.* v. *Bird Machine Co.*, 161 F. 2d 589, 592 (C.A. 1); *North Carolina Finishing Co.* v. *N.L.R.B.*, 133 F. 2d 714, 718 (C.A. 4), cert. denied, 320 U.S. 738.

Other evidence bearing on the Board's conclusion that the discharge of the employees was discriminatorily motivated is supplied by petitioner's conduct with respect to Jack Young's. The record shows petitioner's supervisor Thompson sought to retransfer employee Brewton from one of petitioner's stores to Jack Young's where she had been originally employed. The purpose of this retransfer was to permit employee Charlene Pappin to transfer to petitioner's store and to have her avoid joining the Union at Jack Young's where a union security clause in Jack Young's contract would require Pappin to become a Union member.[7] The credited evidence also

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[7] Petitioner points out in its brief, p. 23, that according to the testimony of Union President Hohlbein, Pappin eventually joined the Union at Jack Young's. The fact that she ultimately joined, however, does not mitigate the evidence which amply demonstrates William Young's resistence in his capacity as manager at Jack Young's, to the union-security clause in the contract. Thus, Pappin told Hohlbein, when he asked her to take out membership, "I am not supposed to join the Union," (Tr. 386). And on a previous occasion, as Hohlbein testified, "She said she would like to (join the Union), but she was afraid to because she has been told not to" . . . "She used the term 'they don't want me to,' she said she had no objections herself" (Tr. 387).

shows that when employee Brewton refused to cross a picket line at Jack Young's, petitioner discharged her.

It is clear, as found by the Board, that petitioner's cooperation with Jack Young's in this enterprise's anti-union activities, is germane to the issue of petitioner's motivation in causing Kelley to discharge all its employees prior to petitioner's assumption of operations,[8] and supports the conclusion that these discharges were for a purpose prohibited by the Act.

B. *Substantial evidence supports the Board's finding that petitioner violated Section 8(a)(3) and (1) of the Act by refusing to hire Norma Newton unless she withdrew from the Union*

As shown in the Counterstatement of Facts, Norma Newton, had been a meat wrapper at Kelley's prior to her discharge. Pursuant to information conveyed to her by Forbes Barnum, another employee, Newton called petitioner to inquire about employment. William Young, petitioner's owner, told her to report for work the next day. Newton inquired whether petitioner was going to be union and Young replied that they had their own union. Newton requested a delay

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[8] The facts set forth, *supra,* fully support the Board's conclusion that petitioner and Jack Young's constituted a single employer within the meaning of the Act. Whether petitioner and Jack Young be considered a single employer or whether petitioner be held accountable for events involving Jack Young's because of the dual capacities served by supervisor Thompson and William Young at both enterprises, the events concerning Jack Young's are significant for showing petitioner's motivation.

in employment. When she called Young again, he told her to "go by the Union and get your withdrawal card and then come in." Newton replied that she could not work without a union and Young answered "Well, then forget it." [9] An employer's refusal to hire because of the applicant's union affiliations violates Section 8(a)(3) and (1) of the Act. *Phelps Dodge* v. *N.L.R.B.*, 313 U.S. 177, 182-187; *N.L.R.B.* v. *Texas Independent Oil Co.*, 232 F. 2d 447, 449 (C.A. 9); *N.L.R.B.* v. *Crean*, 326 F. 2d 391, 394 (C.A. 7); *N.L.R.B.* v. *New England Tank Industries, Inc.*, 302 F. 2d 273, 277 (C.A. 1), cert. denied, 371 U.S. 875; *N.L.R.B.* v. *Wings and Wheels, Inc.*, 324 F. 2d 495, 496 (C.A. 3).

Petitioner's defense amounts to little more than a contention that testimony other than Newton's should have been credited and consequently a different conclusion reached. The findings with respect to Newton are based upon the Trial Examiner's credibility resolutions which were adopted by the Board and which, as this Court has long noted, are for determination by the trier of fact and are not to be lightly overturned. *N.L.R.B.* v. *International Brotherhood of Electrical Workers*, 301 F. 2d 824, 827-828 (C.A. 9); *N.L.R.B.* v. *Radcliffe*, 211 F. 2d 309, 315 (C.A. 9), cert. denied, 348 U.S. 833; *N.L.R.B.* v. *Lozano Enter-*

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[9] Newton's experience with respect to the request to withdraw from the Union was similar to Forbes Barnum. When Barnum applied for work, petitioner made clear that Barnum's employment was contingent upon his withdrawal from the Union. Barnum, however, found other employment and did not report to work for petitioner.

prises, 318 F. 2d 41, 43 (C.A. 9); *N.L.R.B.* v. *Malone Trucking*, 278 F. 2d 92, 95 (C.A. 1); see *N.L.R.B.* v. *Walton Mfg. Co.*, 369 U.S. 404, 406-408.

C. *Substantial evidence on the record as a whole shows that petitioner violated Section 8(a)(3) and (1) by discharging Imogene Brewton and Jack Baldwin*

1. *Imogene Brewton*

As shown by the Counterstatement, William Young transferred Imogene Brewton from Jack Young's Supermarket where she had worked as a regular employee to petitioner's Roberts Lane Store. One month later, supervisor Thompson arranged to transfer her back to Jack Young's and to transfer Charlene Pappin, a new Jack Young's employee, to the Roberts Lane Store so that Pappin could avoid joining the Union under the union-security clause in effect at Jack Young's. Union Representative Hodson had tried on several occasions, but in vain, to make Young comply with the union-security clause.

Jack Young's at this time was being picketed by another labor union. Brewton did not wish to cross the picket line and consequently declined to transfer. Thompson asked whether the Union would get her another job if she lost her current job by refusing to cross the picket line. He told her to make up her mind whose side she was on, Young's or the Union's. When Brewton still refused to cross the picket line, Thompson discharged her. Petitioner's discharge of Brewton for this reason clearly violates Section 8(a)(3) and (1) of the Act. *N.L.R.B.* v. *John Stepp's*

Friendly Ford, Inc., 338 F. 2d 833, 836 (C.A. 9); *N.L.R.B.* v. *Cone Bros. Contracting Co.*, 317 F. 2d 3, 8 (C.A. 5), cert. den., 375 U.S. 945.

Although petitioner introduced other testimony in an attempt to support its theory that Brewton was discharged for inefficiency, the Trial Examiner did not credit the testimony of these witnesses.[10] As this Court has stated, "In large part the findings as to motivation represent an evaluation as to credibility. As to that, we are bound to accept the Examiner's appraisal." *N.L.R.B.* v. *International Brotherhood of Electrical Workers, Local Union 340, AFL-CIO*, 301 F. 2d 824, 827-828 (C.A. 9). See also cases cited, *supra*, p. p.17-18.

2. *Jack Baldwin*

As detailed in the Counterstatement, Baldwin worked at the Jack Young's Store until February 1964, when a picket line established there prompted Thompson to offer to transfer Baldwin to petitioner's Chester Avenue Store. At petitioner's store, Baldwin held the position of head meat cutter and had one apprentice working under him. A few weeks after the transfer, Bill Sing, manager of the Chester Street Store, a man "in complete charge of the store," asked Baldwin if he belonged to the Union (Tr. 156, 261). Sing also asked why he belonged to the Union, and Baldwin replied "because I felt like it." (Tr. 157.)

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[10] The Trial Examiner noted that testimony of Brewton's inefficiency was inconsistent with her status as an employee at Jack Young's Brundage store and her transfer to petitioner's employ only some 30 days prior to her discharge.

Shortly thereafter, when Baldwin returned from vacation William Young discharged him.

Petitioner contended that Baldwin had been discharged because business was slow. The record, however, shows that following Baldwin's discharge, his apprentice was retained and another employee was transferred to Baldwin's job. In addition, the sales record of this store during this period fails to show that there was any appreciable decline in petitioner's business to support petitioner's contention (Res. Ex. 7). Even assuming that some valid reason might have existed for Baldwin's discharge, it is no less a violation of the Act where the facts show that the moving cause for the discharge was Baldwin's Union affiliations. *N.L.R.B.* v. *Texas Independent Oil Co.*, 232 F. 2d 447, 450 (C.A. 9); *Bon Hennings Logging Co.* v. *N.L.R.B.*, 308 F. 2d 548, 554 (C.A. 9).

II. Substantial Evidence Supports the Board's Finding That Petitioner Violated Section 8(a)(5) and (1) of the Act by Refusing to Bargain With the Union as the Collective Bargaining Representative of Its Employees

It is well established that following the purchase of a business which remains essentially the same after the transfer of ownership, the purchaser, as the successor to the business, is bound by certain aspects of the collective bargaining relationship established prior to the transfer. *Wiley* v. *Livingston*, 376 U.S. 543; *N.L.R.B.* v. *Auto Ventshade*, 276 F. 2d 303 (C.A. 5); *Wackenhut Corp.* v. *International Union*, 332 F. 2d 954, 958 (C.A. 9); *N.L.R.B.* v. *Hoppes Mfg. Co.*, 170 F. 2d 962, 964 (C.A. 6); *N.L.R.B.* v.

Lunder Shoe Corp., 211 F. 2d 284, 286 (C.A. 1); *N.L.R.B.* v. *McFarland*, 306 F. 2d 219 (C.A. 10); *N.L.R.B.* v. *Downtown Bakery Corp.*, 330 F. 2d 921, 925 (C.A. 6); *N.L.R.B.* v. *Colten*, 105 F. 2d 179, 183 (C.A. 6); *N.L.R.B.* v. *Armato*, 199 F. 2d 800, 803 (C.A. 7); *N.L.R.B.* v. *Tempest Shirt Mfg. Co.*, 285 F. 2d 1, (C.A. 5); cf. *N.L.R.B.* v. *Stepp's Friendly Ford*, 338 F. 2d 833 (C.A. 9). As these cases show, a successor: has been required to arbitrate pursuant to a collective bargaining agreement between a union and another employer *Wiley* v. *Livingston*, *supra;* has been held responsible for remedying the unfair labor practices of the predecessor *N.L.R.B.* v. *Tempest Shirt Mfg. Co.*, *supra;* and has been required to bargain with the union which represented a majority of employees prior to the sale of business *N.L.R.B.* v. *Auto Ventshade*, *supra.*

We submit that the instant case is controlled by the above precedents. As shown by the undisputed facts, *supra*, petitioner purchased Kelley's three stores in April 1965 and petitioner's newly-acquired business remained essentially the same as the seller's. There is no question of the Union's majority status at the time of the sale. Petitioner admits that it caused Kelley to discharge all employees just prior to petitioner's assumption of operations. It is further not disputed that at the time of their discharge, all employees were members of the Union pursuant to a collective bargaining agreement between Kelley and the Union. As we have shown, *supra*, the evidence fully supports the Board's conclusion that the employees were discharged because of their Union af-

filiations and in an attempt by petitioner to avoid its legal obligations to their Union representative. Having found that the employees were discriminatorily discharged, the Board properly concluded that these employees never lost their status as employees of the business. *N.L.R.B.* v. *Sifers*, 171 F. 2d 63, 66 (C.A. 10); *N.L.R.B.* v. *Cape County Milling Co.*, 140 F. 2d 543, 546 (C.A. 8); *N.L.R.B.* v. *Greenebaum Tanning Co.*, 110 F. 2d 984, 989 (C.A. 7), cert. denied, 311 U.S. 662.[11] Accordingly, petitioner was required to bargain with the representative of these employees. As the Court of Appeals for the Tenth Circuit noted in *N.L.R.B.* v. *Sifers*, *supra*, at p. 66; ". . . . since they were ousted from their jobs because of unfair labor practices, they remained employees for the purpose of determining majority representation by the Union and collective bargaining obligations of the respondent."

The uncontested facts further show that shortly after the sale of the stores and the discharge of the employees, the Union requested petitioner to bargain with it and that petitioner refused to bargain with the Union. The Union's subsequent requests that petitioner bargain were similarly rejected. Since petitioner is required to bargain with the majority representative of its employees, its refusal to do so violates Section 8(a)(5) and (1) of the Act.

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[11] Section 2(3) defines employee to include . . . . "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice . . . .

III. The Board's Remedy Is Proper

Having found that petitioner discriminatorily discharged all the Kelley employees as well as employees Brewton and Baldwin, the Board properly ordered the unfair labor practice be remedied by the reinstatement of these employees and the payment for any loss of pay suffered by reason of their discharges. Contrary to petitioner's suggestion, this order is appropriate and proper in situations where an employer has violated the Act by discriminatory discharges.[12] *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 47-48; *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 187.[13]

The Board noted in its decision that even if it had disagreed with the Trial Examiner's finding that petitioner had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union, it

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[12] Petitioner also argues that the Board's order of reinstatement and back pay is inappropriate because Kelley employees never sought to be hired by petitioner and therefore, petitioner could not be guilty of mass discriminatory refusal to hire Kelley employees (Pet. Br. 16-19). Accordingly, petitioner reasons, no violation having been shown, in the form of a refusal to hire, there is no basis for the Board's remedy. The Board order in the instant case, however, is based on the Board's finding that petitioner violated the Act by causing the discriminatory discharge of employees. It is clear that the Board's remedy of reinstatement and back pay is an appropriate one in such circumstances.

[13] Section 10(c) provides in relevant part that in remedying an unfair labor practice the Board shall "take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act . . . ."

would still remedy the petitioner's discharge in violation of Section 8(a)(3) by requiring reinstatement, backpay and an additional order that petitioner bargain with the Union. See, *Piasecki Aircraft Corp.* v. *N.L.R.B.*, 280 F. 2d 575 (C.A. 3), cert. denied, 364 U.S. 933; *Local No. 152, Teamsters* v. *N.L.R.B.*, 343 F. 2d 307, 309 (C.A.D.C.); *Editorial "El Imparcial"* v. *N.L.R.B.*, 278 F. 2d 184, 187 (C.A. 1). For a remedy to provide for less in these circumstances would be to permit petitioner to benefit from its own violation of the Act. *Medo Corp.* v. *N.L.R.B.*, 321 U.S. 678, 687.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a decree should issue dismissing the petition to review and enforcing the Board's order in full.

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Certificate

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

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